No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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The Acting Solicitor General, the respondent, and the *amici* who support them all contend that the Federal Communications Commission, having presided over the creation of a broadcast industry from which minorities were excluded, now lacks the power to mitigate that exclusion, even by so modest a means as the distress sale policy at issue here. They maintain that the FCC is helpless despite Congress' express endorsement and adoption of the FCC's minority ownership policies, or the FCC's constitutional and statutory duty to advance diversity of viewpoint in the limited resource of the broadcast spectrum. To the contrary, nothing in the equal protection component of the Fifth Amendment or in the decisions of this Court paralyzes the ability of the national legislature to adopt "so modest and targeted a program furthering such a compelling aim . . .". *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 953

(D.C. Cir. 1989) (Wald, C.J., dissenting), *cert. granted*, 110 S. Ct. 715 (1990).

I. THE DISTRESS SALE POLICY DOES NOT STIGMATIZE MINORITY BROADCASTERS.

Invoking the statement in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989) that racial distinctions "carry a danger of stigmatic harm," the Acting Solicitor General attacks what he describes as "an official *presumption* that the color of a person's skin or his ethnic background will predict the way he will think and act." U.S. Br. 22 (emphasis in original). But no such presumption underlies the FCC's minority ownership policies. Rather, those policies rely on principles concerning the public value of diversity of expression that are deeply rooted in the decisions of this Court.

The Acting Solicitor General suggests that the FCC's policies rest on mechanistic assumptions about the relationship between skin color and expression: that the beliefs and expression of individual broadcasters can be confidently predicted from their ethnic background. But the FCC has never maintained that ethnicity and expression bear a one-to-one correspondence in individual cases. Rather, the FCC's policies reflect the sensible conviction that in the *aggregate*, greater diversity of viewpoint should be expected in a broadcast industry in which minorities are represented as owners than in a broadcast industry from which they are excluded.

That reasonable expectation flows not from skin color, but from the indisputable fact that the experiences, perspectives, and views of minorities are not identical with those of the white majority in this country. Who would seriously contend that on questions such as national policy toward South Africa, or immigration policy, or bilingual education, that public opinion polls would produce results among members of minority groups that mirrored the views of the majority?

Acceptance of these propositions neither stigmatizes nor stereotypes minorities; it recognizes reality. Justice Powell, in his pivotal opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), warned that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Justice Powell's warning was the source of the Court's concern regarding the "danger of stigmatic harm" that appears in the plurality opinion in *Croson*, 109 S. Ct. at 721. But Justice Powell, alert to the risks of racial stereotyping, found *no* such stigma in a university admissions program that takes into account the differing backgrounds and experiences of its students.

> An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

438 U.S. at 314 (footnote omitted).

The fact is that the Acting Solicitor General uses the concept of "stereotyping" very differently than

Justice Powell did in *Bakke* or the Court did in *Croson*. Those stereotypes brand minorities as unable to succeed in a competitive arena—medical school admissions in *Bakke*, competitive bidding for public contracts in *Croson*—without a governmental boost to give them an advantage over nonminorities seeking the same goal. It is something very different, as Justice Powell recognized in *Bakke*, to acknowledge that minorities may have distinctive views and perspectives worthy of expression. Acceptance of that indisputable fact is not "stereotyping" of any description, and it is a far cry from the racial stereotyping addressed in *Bakke* and in *Croson*.

The principle that diversity of membership (and the diversity of expression it encourages) contributes to the proper functioning of public institutions considerably predates *Bakke* in the decisions of this Court. The Court has long held that defendants are deprived of their Sixth Amendment right to trial by an impartial jury when the venire fails to represent a fair cross-section of the community. "That traditional understanding [of how an impartial jury is assembled] includes a representative venire, so that the jury will be, as we have said, 'drawn *from* a fair cross section of the community. . . .' " *Holland v. Illinois*, 110 S. Ct. 803, 807 (1990), *quoting Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (emphasis added by the Court).

In *Taylor*, the Court held that a venire could not represent a fair cross-section of the community "if large, distinctive groups are excluded from the pool." 419 U.S. at 531. "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared

with the constitutional concept of jury trial." *Id.* The reason for this, the Court explained, is that the exclusion of segments of the community from jury service deprived the jury's deliberations of the perspectives of members of those groups. The Court found no difficulty in concluding that diverse community groups—whether defined by ethnicity or, as in *Taylor*, gender—contributed distinctive perspectives to expression within the jury room.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Taylor, 419 U.S. at 532 n. 12, *quoting Peters v. Kiff*, 407 U.S. 493, 503-504 (1972). *See also McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) ("[i]ndividual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable[,]' " *quoting Peters*, 407 U.S. at 504); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) ("wholesale exclusion of these large groups [blacks, women, and Mexican-Americans] from jury service clearly contravened all . . . of the aforementioned purposes of the fair-cross-section requirement").

These principles echo the premises on which the FCC's minority ownership policy is based. The Court

has never regarded as either a stigma or a stereotype the constitutional principle that all distinctive community groups be included in the jury venire. The Court has simply assumed—and there is no reason to doubt that assumption—that discrete groups within the community will have distinctive views to impart, even though precisely what those views might be cannot be predicted for any particular juror or any particular case. Just as the fair cross-section principle serves to ensure the impartial jury guaranteed by the Sixth Amendment, so do the FCC's minority ownership policies seek to achieve "the public's interest in receiving a balanced presentation of views" required under the Communications Act and the First Amendment. *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984).[1]

II. CONGRESSIONAL APPROVAL OF THE DISTRESS SALE POLICY'S ENDS AND MEANS CANNOT BE DISREGARDED.

The Acting Solicitor General concedes Congress' broad remedial powers and the legitimacy of the governmental goal to promote diversity of opinion and viewpoint. U.S. Br. 21. Moreover, it is undisputed that Congress has acted on four separate occasions to express in legislation its approval of the FCC's minority ownership policies, including the distress sale policy at issue here. But through a series of ingenious

[1] Nor has the Court required empirical proof of this principle. In *Ballard v. United States*, 329 U.S. 187 (1946), the "view that an all-male panel drawn from various groups in the community would be as truly representative as if women were included, was firmly rejected[.]" *Taylor*, 419 U.S. at 531. But empirical proof of this proposition did not appear until at least 10 years afterward. *Id.* at 532 n. 12.

procedural objections, the Acting Solicitor General seeks to avoid the force of Congress' express exercise of its legislative authority.

• The Acting Solicitor General argues that "Congress has never adopted legislation that expressly directs the FCC to adopt a distress sale policy in order to promote programming diversity." U.S. Br. 23. There are two assertions imbedded in this point, and both of them are incorrect. *First*, the Acting Solicitor General appears to find a distinction of constitutional dimensions between legislation that commands the FCC to establish a race-conscious policy, and legislation that commands the FCC not to discontinue a policy already in place that meets with Congress' approval. Why such a distinction should make a constitutional difference is inexplicable, and the Acting Solicitor General makes no attempt to explain it. *Second*, the Acting Solicitor General seems to contend that Congress must insert in the language of the statute itself not only that the policy is race-conscious, but also that its purpose is to promote programming diversity. But the nature of the distress sale policy, and the relevant legislative history, are quite clear.[2] Unless the Acting Solicitor General is prepared to maintain that the Members of Congress did not understand what they were voting for—and he advances

[2] In fact, the appropriations bills each expressly referred to the distress sale policy, and declared that its purpose was "to expand minority and women ownership of broadcast licenses. . . ." *See* 162a, 163a, and Appendix to Brief for Petitioner. This language is as plain as it can be; there is no doubt about Congress' intentions.

no such contention—his arguments are simply formalistic, with no basis in policy or in fact.[3]

• The Acting Solicitor General seeks to impugn the factual record on which Congress based its action through various dismissive labels, describing it as "scattered anecdotal testimony" (U.S. Br. 24), "an unfocused gathering of information" (*id.*), and "untested assumptions" (*id.* at 26). It is difficult, to say the least, to discern in these adjectives a workable standard for judicial review of Congress's factfinding in the course of its legislative function. A court would surely have a difficult time in determining—especially in the delicate task of reviewing how the national legislature had exercised its legislative authority—whether Congress' factfinding was non-"anecdotal," or adequately "focused." In *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980), this Court required only that Congress possess a "rational basis" in fact for race-conscious remedial legislation. There is no support for the more stringent, albeit unarticulated,

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[3] *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), the sole authority cited by the Acting Solicitor General in support of his contention, has nothing to do with race-conscious legislation, but rather with states' sovereign immunity under the Eleventh Amendment. In *Dellmuth*, the Court made it clear that the reason for an "unequivocal and textual" declaration by Congress is so that there can be no doubt as to Congress' intentions. *Id.* at 2401. But it is impossible to read Congress' enactments regarding the distress sale policy and come away with the slightest doubt as to what was intended. "Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment." *Fullilove v. Klutznick*, 448 U.S. 448, 467 (1980).

standard of review that the Acting Solicitor General appears to have in mind.

• The legislative record was far more extensive than the Acting Solicitor General acknowledges, as explained in detail in the Brief of the United States Senate as *Amicus Curiae* in *Metro Broadcasting, Inc. v. FCC*, No. 89-453. As the Court explained in *Fullilove*, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. Nor is Congress confined to the perimeters of the legislative record before it regarding the specific legislation at issue; it can also rely on an "historical basis" derived from long experience in the field, a basis that was assuredly present here. *Id.*[4]

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[4] Acknowledging that a 1988 report by the Congressional Research Service supports Congress' conclusion that there is a nexus between minority ownership and diverse programming, the Acting Solicitor General simply dismisses the report on the strength of Judge Williams' dissenting opinion in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 358-61 (D.C. Cir. 1989), *cert. granted*, 110 S. Ct. 715 (1990). It is worth noting, however, that in other contexts Judge Williams has been willing to credit studies in the elusive area of broadcast expression even when those studies were based on anecdotal evidence rather than statistically valid sampling.

> [I]n the absence of either any statistically valid evidence on the other side, or even a suggestion of how the Commission could have constructed a statistically valid study, we are perplexed as to what the Commission was supposed to have done. Editorial decisions are obviously driven by many factors. Isolation of causes in any scientific way seems virtually impossible.

Syracuse Peace Council v. FCC, 867 F.2d 654, 664 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990).

In short, the Acting Solicitor General seeks to impose on Congress an undefined procedural code to test the adequacy of Congress' factfinding when it enacts race-conscious remedial measures. But the Acting Solicitor General has disregarded the Court's admonition that "we must be particularly careful not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). Congress' factfinding here was unassailable, and the force of its legislative adoption of the distress sale policy must be respected.

III. THE DEMISE OF THE FAIRNESS DOCTRINE DOES NOT REMOVE THE COMPELLING INTEREST IN DIVERSITY OF EXPRESSION.

The Acting Solicitor General contends that the FCC's abandonment of the fairness doctrine undermines diversity of expression as a compelling governmental interest, because the Commission determined—to be sure, "in another context," U.S. Br. 25—that enough broadcast voices now exist to ensure diversity of expression. The Acting Solicitor General is incorrect; the FCC expressly stated in its fairness doctrine opinions that it was making no such finding.

In *Syracuse Peace Council*, 2 F.C.C. Rcd 5043 (1987), *recons. denied*, 3 F.C.C. Rcd 2035 (1988), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990), the FCC abandoned the fairness doctrine because it concluded that the doctrine inhibited broadcasters from covering controversial public issues, and involved the government intimately in the content of broadcast expression. "Because the net effect of the fairness doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public." 2 F.C.C. Rcd at 5052.

The FCC made it clear that there were two different concepts of scarcity involved in the issue. The first, which the FCC denominated "numerical scarcity," represented scarcity of broadcast outlets available to the public. It was that sort of scarcity that the FCC believed no longer existed, and that could no longer justify content-based regulation in the form of the fairness doctrine. 2 F.C.C. Rcd at 5054. The second type of scarcity—spectrum (or allocational) scarcity—represented the technical inability of the broadcast spectrum to accommodate every broadcaster who wished to make use of it. The FCC determined that spectrum scarcity remains a fact of life, although the FCC deemed it irrelevant to the constitutionality of the fairness doctrine. *Id.* at 5055. *See also Syracuse Peace Council*, 867 F.2d at 682-83 (Starr, J., concurring).

The FCC carefully explained that the continued existence of spectrum scarcity, though irrelevant to the fairness doctrine, is highly relevant to its licensing function—the function at issue in this case. "That spectrum scarcity should be irrelevant for First Amendment purposes does not affect its relevance to the Commission's allocational and licensing function." 2 F.C.C. Rcd at 5069 n.204. On reconsideration, the FCC reiterated: "Neither [the original] order nor this reconsideration calls into question the constitutionality of our content-neutral, structural regulations designed to promote diversity." 3 F.C.C. Rcd at 2041 n.56.

In short, the Acting Solicitor General has overlooked the FCC's own explicit statements that the increase in the number of broadcast outlets does not affect its duty to allocate the broadcast spectrum to maximize diversity of viewpoint. The compelling interest in allocating broadcast licenses to maximize diversity of expression—the interest that underlies the distress sale policy—is thus undiminished by the Commission's statements in its fairness doctrine opinions.

CONCLUSION

For the reasons stated herein, and in the Brief of Petitioner, the decision of the court of appeals should be reversed.

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